

OPINION AND AWARD

OF

DAVID S. PAULL

**In the Matter of the Arbitration Between**

**Law Enforcement Labor Services, Inc., Local No. 207**

**AND**

**City of Coon Rapids, Minnesota**

Issued February 15, 2006  
BMS Case No. 05-PA-996

# **OPINION**

## **Preliminary Matters**

The Arbitrator was selected by mutual agreement from a list provided by the Minnesota Bureau of Mediation Services. A hearing was conducted on Thursday, November 3, 2005, in Coon Rapids, Minnesota. Additional hearings were held on Tuesday, November 29 and Wednesday, December 7, 2005. The City of Coon Rapids, Minnesota (“City”), was represented by Joseph G. Schmitt, a lawyer with offices in Minneapolis, Minnesota. Law Enforcement Labor Services, Inc., was represented by Stephen W. Cooper, a lawyer also with offices in Minneapolis.

At the hearing, the testimony of witnesses was taken under oath and the parties presented documentary evidence. The hearing was transcribed by a court reporter. After the witnesses were heard and the exhibits were presented, the parties submitted simultaneous written closing statements. The parties agreed to submit initial written closing arguments and responding statements. All written arguments were timely sent and received on or before Tuesday, February 7, 2006. Thereafter, the grievance was deemed submitted and the record closed.

## **Issue**

The parties agreed on the exact statement of the two issues to be resolved:

Did the City have just cause to terminate the employment of the Grievant on March 17, 2005, and if not, what is the appropriate remedy?

Should the Grievant be reinstated due to certain alleged irregularities in the investigation of this matter?

No procedural issues were raised by the parties.

## **Relevant Contractual Provisions**

### **ARTICLE 10 DISCIPLINE**

- 10.1 The Employer will discipline employees for just cause only. Discipline will be in one or more of the following forms:
  - A. oral reprimand
  - B. written reprimand
  - C. suspension
  - D. demotion, or
  - E. discharge
- 10.2 Suspension, demotions, and discharges will be in written form.
- 10.3 Written reprimands, notices of suspension, and notices of discharge which are to become part of an employee's personnel file shall be read and acknowledged by signature of the employee. Employees and the Union will receive a copy of such reprimands and/or notice.
- 10.4 Employees may examine their own individual personnel files at reasonable times under the direct supervision of the Employer.
- 10.5 Discharge will be preceded by a five (5) day suspension without pay.
- 10.6 Employees will not be questioned concerning an investigation of disciplinary action unless the employee has been given an opportunity to have a Union representative present at such questioning.
- 10.7 Grievances relating to suspensions, demotions, or discharges pursuant to the terms of this Article shall be initiated by the Union in Step 3 of the grievance procedure under Article 7.

## **Pertinent Facts**

### The Parties

The City is located northwest of the Minneapolis and St. Paul metropolitan area. It is approximately 23 square miles in size and contains approximately 63,000 residents. At the time of the hearing, the City employed approximately 63 sworn officers, 47 of whom served as patrol officers. Additionally, the City has developed and regularly utilizes an auxiliary classification known as “Reserve Officers.” Despite their designation, Reserve Officers are not sworn personnel, but are volunteers who are permitted to function as assistants to regular patrol officers. Reserve Officers are authorized to direct traffic, guard community events and perform other auxiliary services so that regular sworn personnel are free to perform their duties. At the time of the hearing, the City listed 15 citizens in its Reserve Officer roster.

The Union is the exclusive collective bargaining representative, pursuant to *Minnesota Statutes, Chapter 179A*, for all personnel employed as patrol officers, K-9 patrol officers, detectives and school liaison officers. At all relevant times, the Grievant was serving as a patrol officer. Prior to his termination, the Grievant was continuously employed by the City as a sworn police officer since 1998.

### The Complaint

On January 1, 2005, at approximately 5:00 o’clock in the morning, the Coon Rapids Police Department was contacted by the police department of Mounds View, Minnesota. The Mounds View police advised that they had received a complaint from Amy Lynn Ross, a resident of Mounds View. The complaint alleged that the Grievant

had sexually assaulted Ms. Ross earlier that morning. The task of investigating the complaint on behalf of the City was assigned to Captain Timothy J. Snell. Several hours into his next shift, the Grievant was placed on administrative leave until the matter could be sorted out.

On Monday, January 3, 2005, Captain Snell called Ms. Ross and invited her to the Coon Rapid Police Department to complete a citizen complaint form. She appeared later in the day with her husband. Captain Snell talked preliminarily with Ms. Ross about her allegations, but did not record the conversation.

The Mounds View Police Department also conducted an investigation. The investigation consisted of nine interviews. Statements were taken of Ms. Ross, Mr. Ross, Heather Ellwood, Amber Wylie and the Grievant, among others. All of the Mounds View interviews were conducted between January 1, 2005, and January 5, 2005.

On behalf of the City, Captain Snell conduct ten interviews including Ms. Ross, Mr. Ross, Amber Wylie, Guy Johnson , Eric Prindle, Heather Ellwood, Officer Jarrod Guy and the Grievant. These interviews were completed by February 3, 2005.

In addition to the City, the matter was considered by both the Mounds View Police Department and the Ramsey County Attorney's Office. Neither political subdivision filed any criminal charges against the Grievant .

### The Traffic Stop

The parties do not dispute certain pertinent facts relating to the initial interaction between the Grievant and the complainant, as established by the subsequent investigation. Early on the morning of January 1, 2005, at about 1:30 a.m., the Grievant conducted a traffic stop of a vehicle registered to Todd W. Ross for an equipment

violation. The location of the traffic stop was the intersection of Foley Boulevard and 110<sup>th</sup> Avenue in Coon Rapids. Mr. Ross was operating the vehicle. In accordance with routine procedure, the Grievant requested that a second police car respond. Another patrolman, Officer Jarrod Guy, arrived.

In addition to Mr. Ross, the vehicle contained three passengers including the complainant, Heather Ellwood and Guy Johnson. Ms. Ellwood and Mr. Johnson were friends of Todd and Amy Ross. The record indicates that all four of the occupants, Mr. and Ms. Ross, Ms. Ellwood and Mr. Johnson, had spent the evening at a nearby bar. With the exception of Mr. Johnson, all were visibly intoxicated at the time of the traffic stop.

The Grievant administered a field sobriety test to Mr. Ross. The test disclosed that Mr. Ross's blood alcohol level was .18. Mr. Ross was thereafter placed under arrest by the Grievant and conducted to the back seat of his police car.

After Mr. Ross was seated in the police car, the Grievant returned to the car in which Ms. Ross was seated and stood in view of the three passengers. Ms. Ross began to act erratically. The record discloses that Ms. Ross was already very distraught because her husband had been placed under arrest. It further appears that Ms. Ross was additionally concerned over the prospect that the family vehicle might necessarily be towed. According to the investigation, at times she panicked and cried. In his report to the City Manager, the Grievant described the behavior of Ms. Ross as displaying the "typical erratic emotional shifts of an intoxicated person."

The only person sober enough to drive the car was Mr. Johnson. However, upon inquiry, it was determined that Mr. Johnson did not have a valid license to drive.

Thereafter, both Ms. Ross and Ms. Ellwood used their cellular telephones to attempt to contact another potential driver. During all of this time, the Grievant stood by the passenger side of the vehicle. Ultimately, Ms. Ellwood succeeded in reaching her ex-husband, who agreed to drive the Ross vehicle home.

The conduct of Ms. Ross appeared to become more and more bizarre. According to the Grievant, she began to ask him whether “there was anything she could do to keep him [Mr. Ross] from being arrested.” The Grievant described her behavior at this time as “raunchy and salacious.” At one point, Ms. Ross lifted up her shirt and brassiere, exposing her breasts to the Grievant. Because she was “contained in her vehicle and a driver was en-route to transport her home,” the Grievant stated in his letter, “I decided not to cite her for her behavior . . . I had already arrested her husband and she was not a threat to herself or others.”

Reserve Officer Prindle, a friend and colleague of the Grievant, was also on duty that night. Alerted to the Grievant’s traffic stop by police radio, Reserve Officer Prindle drove to the site of the traffic stop to provide whatever assistance might be required. When he exited his vehicle, he saw the Grievant motion him toward the vehicle previously operated by Mr. Ross. When reached the vehicle, he observed Ms. Ross once again expose herself. Reserve Officer Prindle recalled that after she exposed herself, Ms. Ross “grabbed her breasts and pulled her nipples “ and said something similar to “double D’s baby.” Reserve Officer Prindle also recalls that he heard Office tell Ms. Ross to cover up. Embarrassed by the strange behavior of Ms. Ross, Reserve Officer Prindle left the area.

Captain Snell's report contained several other recollections of Reserve Officer Prindle. According to the report, Reserve Officer Prindle stated that, in the context of his 9 years of experience as a reserve officer, he thought the Grievant was "way too laid back" during the stop. Reserve Officer Prindle further stated that the Grievant did not handle the situation effectively. He criticized the Grievant for engaging in friendly conversation with Ms. Ross, despite her actions, and for acting in a manner that, in his view, appeared to be both unprofessional and inappropriate. Reserve Officer Prindle further disapproved of the Grievant's failure to take more assertive actions to bring about an end to the extraordinary behavior of Ms. Ross.

The record suggests that the Grievant could have applied several techniques to reduce or terminate the remarkable behavior of Ms. Ross, including (1) removing himself from her line of sight, while continuing to observe the occupants, (2) warning Ms. Ross that he would issue a citation to her, (3) issuing a citation to Ms. Ross or (4) warning her that unless she ceased her behavior, she would be arrested.

the Grievant acknowledge that such measures would have been appropriate and that he could have taken such action. However, he affirmed that he did none of these things because, as he testified, he did not believe such action was required under the circumstances.

Officer Ross further acknowledged that he believed Ms. Ross' extraordinary conduct was directed at him. He recalled that he believed that Ms. Ross was "coming on" to him through the several improper propositions and sexual invitations.



### Processing the Arrest

With Mr. Ross still in the back seat of the police car, the Grievant drove to the Coon Rapids police station. He conducted an intoxilyzer test on Mr. Ross. The results were, at this point, reduced to a blood alcohol content of .16. Because he had no prior DUI convictions, the Grievant charged Mr. Ross with a misdemeanor, not requiring incarceration.

Although he was under no obligation to do so, the Grievant obtained permission from the supervisory officer on duty to personally provide a ride home for Mr. Ross. In his letter to the City Manager, the Grievant the “gentlemen who came to pick up the three passengers had told me he would not come back to get Mr. Ross and I knew there were no other valid, sober drivers in his party.” He telephoned Ms. Ross and advised her.

### The Ross Residence

In his letter to the City Manager, the Grievant stated that when he returned Mr. Ross to his home, he first “went into the house to ascertain that Mr. Johnson, the only sober adult, was indeed present.” There was testimony indicating that a police officer should determine, under such circumstances, that some responsible and sober person is available at the residence. Upon arriving at the Ross household, the Grievant was advised that Mr. Johnson was not there because he had decided to walk to a convenience store.

Leaving Mr. Ross in the police car, the Grievant entered the house. In addition to Ms. Ross and her two children, Ms. Ellwood and Amber Wylie were also present. Ms. Wylie was at the time a high school sophomore who had been requested by the Ross family to stay with their children while they were out for the evening.

The parties sharply dispute what took place in the home of Ms. Ross after the Grievant arrived. In her statement to Captain Snell, Ms. Ross stated the Grievant “left Todd in the car and he came into the house.” After the Grievant walked through the house, according to the statement made by Ms. Ross, the Grievant said that he needed to speak to her “in private.” She further stated as follows:

When I went into my room I went to shut on ...turn on the light, cuz he kinda directed me that way, cuz it's ... ya know the front living room there's a little hallway and he kinda said I need to speak with you in private and directed me to my room ... So I ... tried to turn on the light but the ... light switch didn't work ... So he just continued to speak with me and he put his hands on my breasts and was rubbing and what not on my nipple and my ... over my shirt ... but was rubbing on my breasts and as he did this, anybody out in the living room would of thought nothing of it because he just continued to say, um unfortunately I had to take your husband down for a DWI, but he's like it's ... ya know it's okay, he's like um . . by this point I got tears in my eyes and he's like, it's okay. . . it'll go to court, he'll temporarily loose his license, hell get some fines, he'll get it back, ya know, you just gotta learn from it . . .

According to the Grievant's statement to Captain Snell, he entered the house because Ms. Ross invited him to do so. The purpose of the invitation, according to the Grievant's statement, was to show him “something.” The Grievant recalled that Mr. Ross “walks the length of the trailer back to the other bedroom.” Ultimately, according to the Grievant, Ms. Ross called his attention to a painting on the wall.

The Grievant does not dispute that a conversation with Ms. Ross occurred just inside the doorway of her unlit bedroom. But in contrast to Ms. Ross, the Grievant testified that after he asked to speak with her, she walked away from him in the direction of the bedroom. According to the Grievant, the purpose of the discussion was to “chastise” her for her improper conduct at the traffic stop. The Grievant denies, however, that he ever touched Ms. Ross during this conversation or at any other time. He described the event, in part, as follows:

I began to speak to Ms. Ross, and she turned around and started to walk down the hallway toward the bedroom. I didn’t know where she was going at that time. So I followed her – the hallway was completely lit, the bedroom was dark, there was a room off to the side – I’m not sure if it was a close or bathroom which was attached to the bedroom, but the light was on in there as well, so you could see down the hallway and you could see into the bedroom, except the light in the bedroom was not on . . . I told her that her behavior was unacceptable and I didn’t know what she had going on, but she embarrassed herself, essentially scolded her, and she asked a few questions about her vehicle . . .

At this time, according to the Grievant’s statement, he had “no idea what [Ms. Ross’s] intoxication level was.” He assumed that Ms. Ross was still intoxicated, but further testified that the mood swings of intoxicated persons sometimes make them “do things that are difficult to predict ahead of time.” The Grievant also testified that he was aware of the possibility that Ms. Ross might “go through those emotional swings again” while he met with her.

The testimony of Ms. Ross regarding what took place in the doorway of her bedroom was, in some significant degree, corroborated at the hearing by Ms. Wylie. She

testified that, at the time the Grievant and Ms. Ross were standing in the bedroom, one of the children walked over to the area. Ms. Wylie quickly retrieved the child, who by that time had walked well into the bedroom. Ms. Wylie testified that she observed the Grievant's hand on Ms. Ross' side, near and just under her breast.

#### Outside the Ross Residence

After The Grievant's conversation with Ms. Ross, Mr. Johnson returned to the house. The Grievant released Mr. Ross from the squad car. The Grievant and Ms. Ross walked out to the squad car. Again, the parties dispute what occurred at this location.

The Grievant testified that, while still in the house, Ms. Ross requested that he test her breath for alcohol content.

This is the point where she had also requested to take a PBT. So I exited the room . . . She said "Can you give me a PBT? I want to take a PBT to see how drunk I am."

There is no dispute that the Grievant and Ms. Ross walked out to the squad car together. Ms. Ross continued to make improper suggestions, according to the testimony of the Grievant.

Ms. Ross, in her testimony, claims that the Grievant made several improper statements. After she began to blow into the testing device, according to her testimony:

. . . he's telling me "blow harder, good job, blow harder" . . . Meanwhile I'm blowing into the breathalyzer unit, the officer is rubbing up and down my legs and up and down my buttocks and in between my legs and begins to squeeze on my vagina like it's bread dough and at this point I was terrified.

The Grievant completely denies the occurrence of these events. He appears to acknowledge, however, that Ms. Ross was standing “about an arm’s length away . . . within the open door,” as the breath test was administered. Because, as the Grievant testified, he was at this time in a seated position, Ms. Ross was required to bend over to take the test.

In unchallenged testimony, Captain Snell indicated that the Grievant did not administer the test correctly. “[T]he person should be standing upright in an erect position for that test to be administered properly,” Captain Snell stated on cross-examination. He further provided an explanation for the City’s conclusion that the Grievant was not acting properly and was attempting to further an improper goal:

While administering the breath test, he is seated, according to the Grievant, in the squad car and has her leaning into the car giving this breath examination which in 28 years as [a] police officer, I’ve never seen it done that way. In fact, it flies in the face of officer safety, this is a woman who he terms has erratic behavior, called her behavior up and down, this is not one I would put myself in a position where she’s over me, leaning over me and I’m sitting in the car. I can’t imagine letting anyone get a position like - - that is completely contrary to what officers are taught in terms of officer safety. Also this is a woman who is talking to you in a sexual manner and is exposing herself and you have her in what I think would be construed as a sexually enticing position where she’s leaning into your squad car and that, again, doesn’t make any sense to me. So all in all, with all those elements, the things that The Grievant states he did don’t add up to what I would see any police officer doing, quite frankly.

The Grievant confirmed that he had never before administered this test in such a manner. The Grievant also acknowledged, by using such a method, he might have placed himself in danger if Ms. Ross had brandished a weapon of some type. However, the Grievant testified that he was confident that Ms. Ross was not armed. He recognized,

however, that she was still acting erratically and making improper suggestions, even during the walk down to the squad car.

### The Grievance

On February 14, 2005, Captain Snell submitted a 17 page report containing the results of his investigation. In this report, Captain Snell concluded that the Grievant had violated the following departmental policies:

- 3-104: Conduct Unbecoming a Coon Rapids Police Department Officer
- 3-125: Sexual harassment external violations
- 3-108 Immoral Conduct

Policy No. 3-104 requires that police officers refrain from conducting themselves in a manner that “tends to impair the operation and efficiency of the department.” Policy No. 3-125 prohibits sexual harassment by police officers, including “requesting sexual favors, engaging in sexually motivated physical contact or other unwelcome verbal or physical conduct or communications of a sexual nature.” Policy No. 3-108 requires police officers to “maintain a level of moral conduct in their personal and business affairs which is in keeping with the highest standards of the law enforcement profession” and prohibits conduct that tends to “impair” the ability of police officer to perform their duties.

Captain Snell’s report further concluded that the Grievant had violated City policies prohibiting sexual harassment and requiring City employees to conduct

themselves in a manner that is consistent with “high standards.” Specifically, Captain Snell concluded that the Grievant had also violated the City’s Administrative Order No. 141-30 prohibiting sexual harassment and the Employee Handbook section requiring appropriate employee conduct.

The inconsistencies between the statements of Ms. Ross and the Grievant were resolved by Captain Snell in his report as follows:

In this investigator’s opinion the behavior exhibited by the Grievant is consistent with an individual seeking to have contact with another individual, giving support to Amy Ross’s version of the events. One would normally expect a male officer encountering a female acting in a “raunchy and salacious” manner to avoid that individual, not place himself in situation where he is with her and in two instances, alone with her. Nor only did the Grievant fail to remove himself from that situation, he seemed to continually put himself in positions where he was with Amy Ross. The Grievant’s actions were inappropriate, inconsistent and in direct violation of any procedure an officer should follow when encountering this type of situation.

The Grievant met with Chief Stephen Wells and Captain Paul Johnson on February 25, 2005. During this meeting, the Grievant was given a letter advising him that the City intended to terminate his employment based on his conduct in the Ross matter. The letter, signed by Chief Wells, cites to the same rules and regulations that Captain Snell referred to in his investigative report.

On March 8, 2005, the City conducted an informal hearing, required by law, to ensure that the Grievant had a fair and adequate opportunity to respond to the allegations. At this hearing, the Grievant provided the City with a lengthy written defense. Thereafter, the matter was tabled until the Grievant could provide certain additional

materials he wanted the City to consider. These materials were provided on March 11, 2005.

The Grievant was terminated by the City on March 17, 2005, and his grievance was timely filed thereafter.

### Work History

The Grievant's work history as a Coon Rapids Police Officer is somewhat mixed. The record contains evidence of 9 commendations filed in relation to his work as a City police officer, all submitted by persons who encountered the Grievant while discharging his official duties. These letters are, both individually and collectively, quite impressive.

However, there is also evidence of prior misconduct. In June of 2002, the Grievant was placed on an unpaid disciplinary thirty day suspension for maintaining a sexual relationship with a female he met after responding to a domestic disturbance call. On that occasion, the Grievant did not challenge the imposition of the suspension. According to the termination letter, the discipline was implemented for violation of rules prohibiting immoral conduct, taking improper break periods and conduct unbecoming an officer.

The text of the March 17 termination letter indicates that the City considered this prior incident in determining that a discharge was the proper level of discipline.



## **Positions of the Parties**

### The City

The City begins its argument by characterizing this case as the second of two instances in which the Grievant engaged in “inappropriate advances toward vulnerable women he encounters on duty.” The Grievant’s conduct relating to the 2002 disciplinary incident is referred to and is described as a “sexual relationship with . . . a female drug addict whom he had encountered while on duty.” The incident relating to Ms. Ross, described as a “second inappropriate advance,” is similar to the 2002 matter, the City contends.

According to the City, the “inappropriate conduct” of the Grievant with Ms. Ross is established by what the City asserts is the “weight of the evidence.” The testimony of Ms. Ross should be credited over the Grievant’s denials for a number of reasons:

- The Grievant has engaged in similar behavior in the past, providing a motive to lie.
- Regardless of the sexual allegations, the Grievant’s decision to “repeatedly continue his contact with a woman who he claims was thrusting herself at him in a sexual way” is conduct for which he had been given a final warning.
- The Grievant’s testimony is inconsistent with that of every other witness.

- Ms. Wylie had “no discernable reason to lie” and testified that she saw the Grievant touch Ms. Ross in an inappropriate way.
- No other witness in the house supported the Grievant’s claim that a child did not walk into the bedroom.
- The Grievant’s testimony contradicts the testimony of his friend, Reserve Officer Prindle, on the subject of being waved forward at the arrest scene.
- The Grievant’s explanation of his behavior while administering the breath test is “simply impossible to credit” because it was admittedly different than police regular procedure and additionally was “unnatural and dangerous.”
- The Grievant “repeatedly” placed himself in a position where he would be in contact with Ms. Ross, including his failure to remove himself from her line of sight at the stop, his failure to control her behavior through citation or threat of citation, his decision to personally drive Mr. Ross home, his decision to remain in the house while Mr. Johnson was not present, his decision to walk toward an unlit bedroom with Ms. Ross, his decision to give Ms. Ross a breath test without observation by other witnesses.

- By engaging in inappropriate behavior with Ms. Ross, the Grievant placed himself at great risk.
- The Grievant's testimony was "demonstrably false" on certain "key issues," such as his contention that Ms. Ross was not "trying to trade sex for leniency toward her husband."
- The Grievant is an experienced police officer who reviewed his own statements "five or six times" before he testified.

Conversely, the City anticipates that the Union will "attack" the credibility of Ms. Ross. "There is, of course, some merit to this attack" because of the manner in which Ms. Ross conducted herself on the evening of January 1, 2005. "However," the City maintains, "even citizens with impaired judgment – those who are vulnerable because they are under the influence of alcohol – are entitled to police protection."

In any event, argues the City, the Union's attacks on the credibility of Ms. Ross are misplaced. The Union's attempt to discredit Ms. Ross on the basis of her failure to accurately recall times and names of officers and because she was convicted of felony for writing bad checks, is not persuasive. Even if the check charge were true, argues the City, the Grievant is "far more culpable, as his own background check reveals that he himself wrote ten checks with insufficient funds within a single eleven-month period."

The City also contends "it is possible to conclude that neither Ms. Ross nor Mr. is credible, and still conclude that Mr. acted inappropriately." In support of this contention,

the City asserts that “all witnesses” agree that The Grievant was “flirting” with Ms. Ross and “repeatedly initiating contact” and “placing himself alone” with her. It must be reasonably be concluded, the City argues, that the Grievant was a “willing participant” in this behavior. This alone, declares the City, is sufficient to support a termination in these circumstances.

The City also argues that, given the totality of his conduct, just cause exists in this case. “The City relies upon its police officers to protect and serve the public,” the City declares, and “Mr. XXXX took advantage of Ms. Ross’ vulnerability to engage in sexual banter and eventually sexual touching of Ms. Ross.”

Assuming the accuracy of Ms. Ross’ testimony, the Grievant’s conduct, according to the City, violates its sexual harassment and conduct policies.

This would be true even if there were no prior violation, the City contends. However, even if neither Ms. Ross nor the Grievant were entirely credible, the City asserts, termination is still appropriate due to the prior incident in 2002. “Mr. XXXX has revealed himself to be an individual who is willing to take advantage of vulnerable women he encounters in the course of his work . . . The City simply will not tolerate such an individual on its police force.”

The City characterizes the evidence challenging its actions on the grounds of alleged race discrimination and procedural violations in the taking of statements as “red herrings.” Regarding the race allegations, the City takes the position that the Grievant was hired not once, but twice by the City and that no evidence was presented in support of the claim, other than that he was the only “African American police officer at Coon Rapids.”

Captain Snell “followed standard procedure during” during the investigation, the City declares, especially in regard to his failure to record on audio tape the interview of Mr. Ross. However, this was entirely appropriate, according to the City, because Mr. Ross was not a witness to any of these events.

“Mr. XXXX wants to make this arbitration about himself versus Ms. Ross,” asserts the City. This is not correct, in the City’s view, because the Grievant “can only prevail if he is correct, and every other witness is wrong . . . The great weight of the evidence supports the City’s decision to terminate Mr. XXXX.”

### The Union

The Union begins its summation with a definition of the “just cause” standard in termination cases. Seven criteria are noted, including notice, reasonable guidelines, a fair and impartial investigation, sufficient evidence, equal application of the rules, a penalty reasonably related to the seriousness of the offense and the employee’s past employment history. A court case is cited for the proposition that a police officer may not be discharged unless “the cause” is one which “specifically relates to and affects the administration of the office; it must be restricted to something of a substantial nature directly affecting the rights and interest of the public.”

The Union asserts that the City did not give the Grievant proper “forewarning or foreknowledge of the possible or probably consequences.” The Union points out that the vast majority of the Grievant’s actions were found to be correct, and that the termination was based on only a few instances. The Union contends that each of the Grievant’s

actions were correct in the context of some proper police procedure, rules and/or policy of the City. According to the Union, the existence of these procedures, rules and/or policies must necessarily defeat the proposition that the Grievant had any prior knowledge that his conduct was improper. Additionally, the Union argues that the Grievant's compliance with these procedures, rules and/or policies indicate that the termination was not justified.

For example, regarding the City's position that the Grievant should have "removed himself" from the situation and not "socialized" with Ms. Ross and the other passengers, the Union argues that Ms. Ross was also a priority and that there was a legitimate purpose for the Grievant to be near the vehicle, as several of the passengers were "agitated and experiencing mood swings." The Union contends that the officer at the scene had a responsibility to "secure, or have removed, the Ross vehicle." Reference to another court case is made in support of the proposition that "an officer will be held to a duty where some affirmative act of the officer has created the danger to the person."

The Grievant's action to personally drive Mr. Ross home is addressed in a similar context. The Union argues that the Grievant was never alone with Ms. Ross and that it was proper for him to warn Ms. Ross that her actions were improper. "There is no articulable policy violation for Officer XXXX speaking with Ms. Ross," the Union asserts, and the Grievant's short interaction with her was an example of "community-oriented policing," as discussed in *M.S. Section 626.8455*. Additionally, the Union declares that the Grievant did not have foreknowledge of possible negative consequences for practicing the "same community-oriented policing methodology that he always enlists, and for which he has been praised for by department administration."

Although a conflict in the testimony is admitted, the Union maintains that the Grievant “never touched Ms. Ross in any way, inside or outside the house.”

Alternatively, Ms. Wylie’s testimony is characterized by the Union as establishing only that the Grievant “placed his hand on her [Ms. Ross’] side, that hardly constitutes an infraction, nevermind a terminatable (sic) offense.” Assuming any touching occurred, declares the Union, it was in the nature of a “steady” hand.

The City’s criticism of the Grievant providing Ms. Ross a chance to take a breath test is also addressed. The Union asserts that the giving of such a test is common practice when requested and that it was especially called for in this case, as Ms. Ross was behaving angrily and erratically. As to the fact that the Grievant administered the test while he was sitting, the Union takes the position that there is no “standard procedure” or a written protocol. There is no textbook or training pamphlet, argues the Union. The method employed was proper and, in any event, he had no “foreknowledge of negative consequences for this action.”

The Union responds to the City’s view of the Grievant leaving Mr. Ross in the squad car while he entered the house. This is standard procedure, the Union contends, and “[T]aking Mr. Ross to the door with him would have produced a great potential threat of fight or flight if no sober adult was present.”

The Union disputes a number of facts. For example, the Union contends that the Grievant did not ask Ms. Ross to administer the breath test and that this point is confirmed by Mr. Johnson.

Other examples are provided. The Union contends that Ms. Ellwood incorrectly identified how many officers stopped the car, incorrectly testified that Officer Prindle

walked away from the arrest area, did not know the age of her child, mistakenly testified that the windows on the vehicle were closed during the stop and mistakenly testified that everyone in the house was awake when she returned.

Ms. Ross, according to the Union, failed to recall that Ms. Ellwood's child was at her house that night, incorrectly testified that Ms. Wylie came to her house from school, incorrectly testified that the Grievant removed the driver's license from Mr. Ross' wallet, mistakenly denied she was flattered by the Grievant's attentions and mistakenly testified that her husband was not insecure about her. The Union points to evidence indicating that The Grievant was at the Ross house for six or seven minutes. The Grievant could not have engaged in all of the actions alleged in that short period of time, the Union asserts.

The Union challenges other parts of the City's case on the facts, arguing that because the recollection of the witnesses was faulty and, in some cases, their credibility was lacking, that the testimony of the Grievant must instead be credited. For example, the Union contends that Ms. Ellwood could not recall what was said during the trip from the traffic stop to the Ross residence or why Mr. Johnson left the residence upon their arrival. The Union also argues that Ms. Ellwood's testimony confirms the Grievant's testimony regarding his interaction with Ms. Ross in her bedroom.

The Union makes the following additional contentions regarding the evidence:

- The evidence is insufficient regarding what side of Ms. Ross' body the Grievant was allegedly touching;
- Ms. Ross indicated her desire to have sex with the Grievant during the drive home;
- No independent witness testified to any alleged touching;



- The Grievant's demeanor was satisfactory;
- The Grievant was alone with Ms. Ross outside the house during the administration of the breath test;
- Ms. Ross could not recall the "double D's" comment;
- Ms. Ross incorrectly testified that The Grievant commented on the fact that her husband is Caucasian and Ms. Ellwood's boyfriend is African-American;
- Ms. Ross and Ms. Ellwood joked on the ride home that Ms. Ross wanted to have sex with The Grievant;
- When she reentered the house after the breath test, Ms. Ross did not discuss with any person present that the Grievant had acted inappropriately;

The Union maintains that the testimony of Ms. Ross should not be credited because she was motivated to lie in the following ways:

- Ms. Ross acted inappropriately at the traffic stop;
- Mr. Ross was extremely upset about the behavior of his wife;
- Mr. Ross had recently lost his job;
- Ms. Ross expressed a racial bias against the Grievant, an African-American;
- Mr. Ross initiated the call to the Mounds View police;
- Captain Snell initiated the first call to Ms. Ross;
- Ms. Ross had "nothing to lose" by making her complaint.

In support of the contention that "no disciplinable offense" was committed, the Union provides a "comprehensive list of what the Grievant did correctly, in accordance

with applicable law and Coon Rapids Policy.” Specifically, the Union argues that the Grievant acted correctly throughout the entire detection phase of the traffic stop, including the observation of the vehicle, the actual stop, the call to dispatch, the approach to the car, checking the vehicle for contraband and suspicious activity, establishing intoxication, the administration of the breath test, the placing of Mr. Ross under arrest, the procedure used when returning to the vehicle, the processing of the suspect, the safe transport of the suspect back to his house, the determination that a responsible person was at the residence, the attempt at diffusion of spousal anger and the attempt to avoid domestic disruption.

The Union further challenges the investigation. Specifically, the Union contends that Captain Snell did not approach the investigation with an open mind, disregarded the “glaring inconsistencies “ in the statements of the witnesses, did not follow procedure, solicited a complaint from Ms. Ross, failed to interview an officer who allegedly had pertinent information, disregarded the fact that Ramsey County refused to prosecute the Grievant, failed to consider that Ms. Ross was motivated to lie and was intoxicated during both the arrest and the Grievant’s visit to her home.

The Grievant’s due process rights were violated by the City in a number of particulars, according to the Union. The Union contends that the City “pre-determined” the results of the investigation and that the Grievant’s defense materials were not given sufficient consideration. The Union asserts that the Grievant’s locker was searched improperly and that he was faulted for exercising appropriate police discretion.

Several provisions of the Coon Rapids Police Department Manual were violated by Captain Snell, the Union contends. Specific reference is made to the following provisions of this document:

- 2-204 Character: Credited witnesses who were not credible;
- 3-101 Conformance to Laws: Conducting an investigation in which he was not objective;
- Violation of Rules: Omitted statements relevant to credibility;
- 3-112 False Reports: Dissemination of inaccurate information;
- 3-605 Complaint Investigation Procedure: Failing to include all relevant information.

“Despite an extensive, one-sided investigation,” the Union asserts, the City “failed to substantiate Ms. Ross’s unlikely charges.” Thus, the Union declares, the Grievant should be reinstated.

## **Opinion**

### Applicable Principles

The principles that apply to the issues presented by this grievance are well established. The applicable provisions of the CBA are clear and unambiguous. For all bargaining unit members of the Coon Rapids Police Department, discipline may be administered “for just cause only.” Article 10, Section 10.1 envisions a system of discipline beginning with oral and written reprimands and concluding with written suspension, demotion or termination. While the provision suggests that the negotiating

parties contemplated that discipline be implemented progressively, there is no specific requirement that any of these potential consequences be applied in any particular order. Pursuant to Section 10.5, a discharge must be “preceded by a five (5) day suspension without pay.”

The City’s termination letter concisely and plainly lists the rules and regulations the Grievant is alleged to have violated. According to the City, the Grievant’s termination was necessitated by violations of departmental policies 3-104, 3-125 and 3-108, prohibiting unbecoming conduct, sexual harassment and immoral conduct. The City’s Administrative Order No. 141-30 and Section 15.1 of the City’s Employee Handbook were also cited as grounds for the personnel action.

Finally, the City makes it very clear that the termination is based in part on the Grievant’s prior record of discipline. The reference in the letter is to the 30-day suspension issued in June of 2002, for unbecoming conduct, immoral conduct and taking improper break periods.

As the Union correctly argues, the concept of “just cause” incorporates a number of precise elements. The acceptance of these various elements by arbitrators appears to vary from case to case. However, several common themes or rules are universally present.

One rule is that the discipline or discharge of an employee must be supported by sufficient and fair investigation. *Lee Dodge*, 84 LA 1073, 1077 (Chandler, 1985). A second rule requires a showing that the employee was provided some indication or “warning” that his or her conduct (or pattern of conduct) is unsatisfactory. *Federal Aviation Administration, Denver Air Route Traffic Control Center*, 99 LA 929 (Corbett,

1992). However, no warnings are generally required in cases of conduct that is palpably offensive. The rationale for this exception is that conduct that is patently improper is so destructive of the employer-employee relationship, that an employee is expected to know it is wrong, regardless of whether a prior warning is given. *Martin Co.* 27 LA 768 (Jaffee, 1956). In cases alleging misconduct, the burden is on the employer to provide sufficient justification for the discipline.

#### Events Inside the Ross Residence

Although the City and the Union challenge each others contentions of fact on a variety of grounds, the resolution of the grievance must initially focus on two specific factual disputes. The first factual issue relates to whether the Grievant touched Ms. Ross with his hand at the doorway of her bedroom and if so, whether his action was improperly motivated. The second factual issue presents the same type of question, but centers on the events that took place outside the Ross residence.

Ms. Ross testified that the Grievant did initiate sexually motivated physical contact with her at her bedroom door, while discussing the general consequences of an arrest for driving while under the influence. The Grievant and the Union strongly deny that any touching occurred. Additionally, the Union makes an argument in the alternative. Even if the Grievant did physically touch Ms. Ross during the conversation at the bedroom door, the Union asserts, such contact was not sexually motivated. “A steadying hand on the side of a distraught, intoxicated person is neither improper nor sexual,” the Union maintains.

The Union takes the further position that Ms. Ross is well motivated to fabricate the facts relating to the issue of physical contact because she wanted to avoid the further ire of her husband. The Union refers to the inconsistencies in the testimony of Ms. Ross at the hearing, as well as the level of her intoxication during the events in question and her “sexual actions and comments.”

There is some merit in the Union’s contention in this regard. Ms. Ross was very intoxicated and her behavior was palpably improper. However, the City persuasively argues that the Grievant was equally well motivated to falsify his testimony about what occurred, since his job is at stake.

Clearly, any attempt to determine what occurred solely on the basis of the testimony of Ms. Ross or the Grievant would be quite a challenge, given the differences in their testimony. However, such an effort is not required in this case because of the testimony of an independent witness. Ms. Wylie testified that she had an opportunity to briefly observe Ms. Ross and the Grievant when they were standing at the bedroom door. Her recollection was quite clear. As she passed by, she observed the Grievant’s hand on Ms. Ross’ side. When asked to demonstrate the location of The Grievant’s hand, she pointed to the location just under her breast.

The parties have suggested strong reasons to view the testimony of Ms. Ross and the Grievant with caution. However, neither party has suggested any reason why Ms. Wylie might testify falsely, and the record discloses no such reason. The accuracy of Ms. Wylie’s testimony was not significantly challenged at the hearing and her recollection was consistent with her prior statements.

Based on Ms. Wylie's testimony, it must be concluded that, during the time he was inside the house talking with Ms. Ross, the Grievant did place his hand on her side in the location specified by Ms. Wylie.

Having determined that the Grievant touched Ms. Ross while he was in her residence, the motivation for the physical contact remains at issue. Was the Grievant merely offering a "steady hand," as contended by the Union, or was the touching sexual or motivated by a desire on the part of the Grievant to advance some kind of future improper relationship with Ms. Ross.

The record contains more than sufficient evidence to make this determination. Based on the totality of circumstances as disclosed by the testimony, it clearly appears the the Grievant was motivated, not by job related considerations, but by a personal desire to create or promote some type of relationship with Ms. Ross in the future.

A number of factors support this conclusion. The Grievant paid undue attention to Ms. Ross during the traffic stop and repeatedly placed himself in a position where he would be in contact with her. Rather than make an effort to control her behavior by citing her or threatening to cite her for her outrageous behavior, he did very little. The failure to take appropriate action is evidence of an improper motive. This failure was also a disservice to the community that the Grievant serves, as well as to Ms. Ross and her family. Had preventive action been taken, Ms. Ross may have been saved some of the embarrassment and shame she displayed at the hearing.

At the traffic stop, Ms. Ross asked the Grievant whether "there was anything she could do" to keep her husband from being arrested. She exposed herself. She made other suggestions to The Grievant that he himself described as "raunchy and salacious." Yet,

when he had the opportunity to extricate himself from this precarious situation, he did not do so. Instead, despite a variety of available alternatives, he unilaterally decided to personally drive Mr. Ross home and risk further engagements with Ms. Ross. Once there, he entered and remained in the house, although he was aware that Mr. Johnson was not present. He conducted what appeared to be a private conversation with Ms. Ross, although it was clear to him that she was still intoxicated. Additionally, the Grievant's disciplinary history must be considered.

As the Union has so competently argued, the Grievant properly performed a number of duties during the traffic stop. However, despite the propriety of many of his actions, the behavior toward Ms. Ross was consistent with an improper intention. Given her actions and statements during that morning, there is sufficient evidence to conclude that some type of future sexual relationship was contemplated by the Grievant.

#### Events Outside the Ross Residence

Again, the testimony concerning the events that occurred outside the Ross residence, in and near the Grievant's squad car, is in direct dispute. The Grievant testified that Ms. Ross asked to take a breath test. Ms. Ross denies that she requested the test and claims that, during the test, the Grievant touched her in a decidedly sexual manner. The Grievant denies the touching.

Unlike what occurred inside the house, no independent witness observed the events occurring outside the Ross residence. However, the Grievant's testimony relating to what occurred outside the house cannot be accepted, in the context of what occurred



inside the residence and the conclusions necessitated by those findings. The same factors are applicable – the undue attention paid to Ms. Ross, the repeated efforts to be in personal contact with her and the lack of any serious attempt to control her behavior.

This conclusion is also well supported by a factor that is independent of what occurred inside the residence. The method selected by the Grievant to administer the test was, to say the least, unusual. In point of fact, the testimony clearly establishes that the Grievant did not administer the test correctly. The record clearly indicates that the test should be given to a subject standing erect. The Grievant, however, administered the test from a sitting position, forcing Ms. Ross to bend over into the squad car.

The Grievant's testimony acknowledges that this was a deviation from the normal procedure. He admitted that he had never used that particular procedure before. Captain Snell confirmed that administering the breath test in this manner was not recommended and potentially dangerous. No sufficient explanation for this action was ever suggested by the Grievant for this variation. There was no evidence to show that this departure was consistent with any proper police purpose. The procedure used by the Grievant to administer this test, aside from the issue of his credibility, demonstrates a violation of the rules and regulations cited by the City.

#### Notice of and Compliance with City Policies, Rules and Regulations

The Grievant's conduct with Ms. Ross was clearly improper in the context of the rules that police officers must follow. The rules and regulations maintained by the City are sufficiently clear on this point. As promulgated by the City, physical contact

motivated by such personal considerations would certainly violate the rules prohibiting sexual harassment, pursuant to Policy No. 3-125. Such behavior would similarly constitute violations of Policy No. 3-104 prohibiting conduct “unbecoming” a police officer. That same conduct would constitute violations of Administrative Order No. 141-30 and Policy No. 3-108, as these rules prohibit conduct that might tend to “impair” the officer’s ability to properly perform his or her duties.

On the question of notice, the Grievant did not claim that he was unaware of these rules and there is no evidence indicating that they were not properly disseminated. There was no evidence to show that these rules had been inequitably enforced or were subject to a challenge on the grounds that they were unreasonable or unfair. It appears that these rules can be violated regardless of whether such physical contact is welcomed or invited by the recipient.

#### The Investigation and Race Allegations

The Union’s argument regarding alleged deficiencies in the investigation have been noted and carefully considered. While no inquiry is perfect, no errors occurred that were sufficient to compromise the objectivity or the integrity of the investigation.

Similarly, the Grievant’s allegation that the City’s action was racially motivated has been noted. However, the evidence offered in support of this allegation was not sufficient to suggest that the City acted in bad faith or was motivated by improper considerations.

### Inconsistent Witness Testimony

To some extent, almost all of the witnesses at the hearing made statements that were inconsistent with prior interviews, including the Grievant and Ms. Ross.

Sometimes, inconsistent statements can be an indication of unreliability or selective recollection. However, this is not always true and it does not appear to be true in this case.

This hearing in this case was conducted almost a year after the events occurred. With only a couple of exceptions, all of the witnesses who testified at the hearing appeared for previous interviews and gave prior statements. All of the initial statements were taken within a few days or weeks of the incident, when memories were fresher.

All witness statements, including all prior statements, were considered in the preparation of this opinion and award. Both parties did an excellent job of pointing out the various inconsistencies and they were noted. However, none of the variations appeared to be sufficiently material to require a credibility determination based solely on these grounds. Most of the witnesses testified that they did not have an opportunity to review their prior statements. Given the length of time between the events and the hearing, it would be surprising if all of the testimony was perfectly consistent with the prior statements. In some cases, as has been noted, the prior statements appeared to be more reliable than the testimony elicited at the hearing.

### Appropriate Discipline

It is fundamental that in disciplinary cases, the employer's decision must be consistent with the nature of the offense. The penalty must be reasonably related to the seriousness of the infraction. Proof that the discipline is appropriate is an element of just cause. *Huntington Chair*, 24 LA 491 (McCoy 1955). See also, *LELS and the City of St. Louis Park*, BMS 00-PA-480 (Lundberg, 2000) and BMS 01-PA-460 (Jay, 2001).

In this case, the City's decision to terminate the Grievant does appear to be appropriate. The community must rely upon its police officers to serve and protect them. The discharge of this essential duty is especially important when a citizen is impaired due to the excessive consumption of alcohol.

By all accounts, Ms. Ross was quite intoxicated on the morning of January 1, 2005. Under any reasonable criterion, her behavior was improper. Although she appeared to invite improper treatment, it was incumbent upon the Grievant to discharge his duties in a manner consistent with City rules and regulations. Regardless of her condition and her behavior, these rules required that Ms. Ross be treated professionally from the moment the car was stopped until the time the arrest was fully processed.

The Grievant's actions placed the City in an adverse position. Rather than protect and serve Ms. Ross, he appeared to capitalize on her diminished condition resulting in improper banter and physical contact.

Additionally, as his employment history reflects, this is not the first time The Grievant has taken advantage of a woman he met while in the course of performing his duties. Neither the City, nor any other similar political subdivision, can afford to retain an

employee who displays a history of taking advantage of persons encountered while in the process of discharging the important duties of a police officer.

Having carefully considered the testimony and exhibits received into evidence, as well as the written arguments of the parties, it is the opinion of the Arbitrator that the termination of the Grievant was for just cause and that the investigation was properly conducted.

For the foregoing reasons, the grievance is DENIED.

## **A W A R D**

1. **IT IS THE OPINION AND AWARD** of the Arbitrator that Officer the Grievant was terminated for just cause and that the investigation into his behavior was properly conducted.
2. **IT IS THE ORDER** of the Arbitrator that the grievance be denied and dismissed.

February 15, 2006  
St. Paul, Minnesota

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David S. Paull, Arbitrator